

Can a No-Poach Agreement Be Justified? The Legitimate-Objective Route in *Tondela* (Part 2)



This¹ is the second of a two-part article analysing the Court of Justice of the European Union (CJEU) judgment in *Tondela* which addresses no-poach agreements, made in the context of the Covid-pandemic, by professional football clubs. Part 1 (see [here](#)) examined whether such an agreement is a restriction of competition ‘by object’ at all. [Part 1](#) set out how, even though the CJEU described the arrangement as a “*manifest restriction of a competitive parameter*”,² it declined to treat that fact as sufficient in and of itself to constitute a “by object restriction”: the ‘by object’ characterisation turns on a structured assessment of the agreement’s content, context and objectives, which the CJEU left to the referring national court to conduct.

This article is Part 2, which turns to the CJEU’s second question. Assuming the agreement falls within scope of the prohibition in Article 101(1) TFEU (prohibited anti-competitive agreements), can it nonetheless avoid being deemed unlawful? This second part works through the legitimate-objective route derived from *Wouters* and *Meca-Medina*,³ the suitability, necessity and

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² *Tondela*, para 53.

³ Under *Wouters*, an agreement that restricts competitive freedom may nonetheless fall outside Article 101(1) TFEU where the restrictions are inherent in, and proportionate to, the pursuit of a legitimate objective: *Case C-309/99, Wouters [2002] ECR I-1577*, para 97. In *Meca-Medina*, the CJEU extended that framework to sport, holding that rules pursuing legitimate sporting objectives (such as equal chances for athletes, competitive integrity and ethical values) may escape Article 101(1)

proportionality test the CJEU applied; the CJEU's answers to the referred questions; and the practical blueprint the judgment offers to clubs and governing bodies seeking to defend such arrangements in future.

This article looks at:

- The legitimate-objective defence: protecting the regularity of sporting competition
 - Applying the test: suitability, necessity and proportionality
 - Sporting integrity as a recognised objective: the role of Lehtonen
 - What the referring national court must now decide
- Summarising the Referred Questions and the CJEU's Answers
 - Question 1 (addressed with Question 2): Can the agreement escape Article 101(1)?
 - Question 3: Is the agreement a restriction 'by object'?
- Concluding Remarks: A blueprint for defence, not replication

The legitimate-objective defence: protecting the regularity of sporting competition

Should the referring court conclude that the agreement does *not* reveal a sufficient degree of harm to competition to be classified as a restriction by object, the analysis does not end there. As the CJEU confirmed in *European Superleague*, it is only if conduct is found not to have an anticompetitive object that it becomes necessary, "*in a second stage, to examine its effect*" on competition.⁴ If that effects assessment reveals actual or potential harm to competition, a further question then arises: can the arrangement nonetheless escape the prohibition by reference to a legitimate objective under the *Wouters/Meca-Medina* line of case law or, failing that, by satisfying the conditions for an exemption under Article 101(3) TFEU? As *European Superleague* makes clear, that legitimate-objective route is available only where the conduct does not have an anticompetitive object; where it does, Article 101(3) TFEU is the sole available exemption.⁵

TFEU provided the resulting restrictions go no further than necessary to ensure the proper conduct of competitive sport: *Case C-519/04 P, Meca-Medina and Majcen v Commission* [2006] ECR I-6991, paras 42–45.

⁴ *European Superleague*, para 159.

⁵ *European Superleague*, paras 186–187.

The CJEU recognises that ensuring the regularity and orderly completion of sporting competitions is a legitimate objective in the public interest, particularly in the context of professional football.⁶ However, that objective has an expressly defined limit: the CJEU made clear that the roster-stability rationale does not extend to unilateral contract terminations "*founded on valid reasons, such as non-payment of salary by a club to its player or a disciplinary offence such as to justify such termination*".⁷ The legitimate objective reaches only as far as the crisis-driven disruption it is intended to remedy and even within those bounds, establishing legitimacy is necessary but not sufficient.

Applying the test: suitability, necessity and proportionality

The CJEU makes clear that the objective justifies the restriction only if the agreement also satisfies the requirements of suitability, necessity and proportionality – which are themselves the tools for testing whether the objective genuinely legitimises the restriction in practice:

- *suitability*: whether the specific measures are suitable for achieving the legitimate objective;
- *necessity*: whether there are no other equally effective measures that are less restrictive of competition; and
- *proportionality*: whether the restrictive effects are not disproportionate to the objective, in particular by eliminating all competition on the market concerned.⁸

Those questions are left to the Portuguese court, which must conduct a detailed, evidence-based assessment of whether the specific measure was genuinely required to achieve the stated aim.

What is interesting is that the *Tondela* formulation of necessity – "*no other measures which would be equally effective... while being less restrictive of competition*" (para 98) – sits closer to the indispensability standard under Article 101(3) TFEU⁹ than to the *Wouters/Meca-Medina* test, which asks whether the restrictive effects are "*inherent*" in the pursuit of a legitimate objective and go no further than "*necessary*" for that purpose.¹⁰ If that equivalence holds, the burden on parties invoking the *Wouters* doctrine in sport cases may be higher than previously assumed.

⁶ *Tondela*, para 96.

⁷ *Ibid*, para 85.

⁸ *Tondela*, para 98.

⁹ Commission Guidelines on Article 101(3) [2004] OJ C101/97, para 73.

¹⁰ *Wouters*, para 97; *Meca-Medina*, paras 42–45.

The practical implication for clubs and sporting federations is that abstract references to “integrity” or “stability” are insufficient. Parties must demonstrate, concretely, why the restraint was necessary and proportionate in the circumstances that the agreement was made.

Sporting integrity as a recognised objective: the role of Lehtonen

The CJEU confirms that *"the objective consisting in ensuring the regularity of sporting competitions is a legitimate objective in the public interest which holds particular importance in the case of football and which may inter alia justify, in principle and without prejudice to their actual content, the adoption of rules on time limits for transfers of players during a competition, and also rules intended to ensure the maintenance of a certain degree of stability in clubs' player rosters"*.¹¹

This is consistent with the CJEU's long-standing approach: in *Lehtonen*,¹² the CJEU had already recognised that mid-season transfer restrictions could be justified by the need to preserve the regularity and integrity of sporting competition – the same objective reaffirmed in *Tondela*.¹³

The CJEU further adds that *"the pursuit of such an objective is capable of justifying, in principle and without prejudice to their actual content, the rules implemented by an agreement such as the one at issue in the main proceedings."*¹⁴ The words 'without prejudice to their actual content' carry real weight: recognising the sporting-regularity objective as legitimate does not mean that any particular measure taken in its name is automatically acceptable. The specific terms of the restriction must still be examined. That examination takes the form of a three-part test of suitability, necessity and proportionality.

What the referring national court must now decide

At paragraph 98, the CJEU sets the examination to be conducted:

"the examination thereof involves, first of all, a determination of whether the specific pleas in law relied on in a given case to pursue a legitimate objective in the public interest are suitable for ensuring achievement of that objective; next, an assessment of whether the reliance on those pleas is necessary for achieving that objective, which means that there are no other measures which would be equally effective for that purpose while being less restrictive of competition; and, lastly, making sure that the restrictive effects caused by the

¹¹ *Tondela*, para 96.

¹² Case C-176/96, *Lehtonen and Castors Canada Dry Namur-Braine v Fédération royale belge des sociétés de basket-ball* [2000] ECR I-2681

¹³ *Tondela*, para 85.

¹⁴ *Ibid*, para 97.

measures adopted are not disproportionate to such an objective, in particular by eliminating all competition on the market concerned".

The CJEU makes clear that this analysis is for the referring court to conduct "in-depth", taking into account the arguments and evidence of the parties.¹⁵

Lastly, it is also worth noting that the CJEU makes clear that the *Wouters/Meca-Medina* line of case law¹⁶ "does not apply in situations involving conduct which, far from merely having the inherent 'effect' of restricting competition... reveals a degree of harm that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition".¹⁷ If the referring court concludes that the agreement does constitute a by-object restriction, the only route to exemption is Article 101(3) TFEU, not the *Wouters* doctrine.

CJEU vs Advocate General: Convergence in outcome, divergence in tone

Stepping back slightly from the detail of the CJEU's analysis, it is worth considering how the judgment sits alongside the Advocate General's Opinion.¹⁸ On the direction of travel, the two are clearly aligned: both the Advocate General and the CJEU reject a rigid, formalistic approach and accept that context and sporting specificities are relevant to the assessment.

However, there is a noticeable difference in tone.

The Advocate General adopted a more expansive framing, emphasising the importance of context and suggesting that the agreement might even exhibit pro-competitive characteristics, in that it preserved the structure and integrity of the competition.¹⁹ By contrast, the CJEU adopts a more cautious approach. It begins by emphasising the manifestly anticompetitive nature of no-poach arrangements and then allows context and objectives to operate within a disciplined analytical framework.

¹⁵ *Ibid*, para 99.

¹⁶ See *Wouters* (para 97), *Meca-Medina* (paras 42-45). This line of case law demonstrates that an agreement may fall outside Article 101(1) TFEU altogether if it is necessary for the pursuit of a legitimate objective. See footnote 2 above.

¹⁷ *Tondela*, para 92.

¹⁸ *Supra*, n. 5.

¹⁹ Opinion of Advocate General Emiliou, Case C-133/24, *CD Tondela – Futebol, SAD v Autoridade da Concorrência*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62024CC0133> (last accessed 25 June 2026), point 53.

The result is a narrower and more doctrinally disciplined approach. The CJEU does not dilute the concept of 'by object' restrictions; instead, it reinforces the need to apply that concept carefully and strictly.

Several textual indicators illuminate this difference. The Advocate General had suggested at points that the agreement's pro-competition aim, maintaining squad stability and competition integrity, was not merely incidental but was intrinsic to the proper functioning of the sporting competition itself.²⁰ The CJEU acknowledges this reasoning and adopts it substantively, but it does so by embedding it within the by-object framework rather than treating it as a freestanding justification.

As mentioned above, the CJEU firmly characterises the agreement as "*a manifest restriction of a competitive parameter which plays an essential role in high-level sport*".²¹ It leaves no doubt that this is not conduct that escapes scrutiny by virtue of its sporting character. The CJEU then proceeds, step by step, to consider whether context and objectives displace that initial characterisation, rather than starting, as the Advocate General appeared more inclined to do, from the specific context and working outward.

The sharpest expression of the CJEU's more disciplined approach appears at paragraph 41, where it states that, for a finding of anticompetitive object beyond hardcore cartels, "*it is necessary to demonstrate that such conduct carries a sufficient degree of harm to competition, meaning that they must have a manifest anticompetitive rationale*". By quoting the Advocate General's language from point 28 of his Opinion on this point, the CJEU signals agreement with the conceptual framework whilst keeping the analytical burden firmly in place.

The CJEU's ruling at paragraph 89 captures the balance:

the agreement "*must be categorised as an agreement having as its object the restriction of competition, unless a specific examination of the content of that agreement, its objective aims from a competition standpoint and the specific economic and legal context of which it forms part makes clear the specific reasons why the competent authority or court considers that it must not be so categorised*".²²

In other words, the agreement is presumptively a by-object restriction, but the presumption is context-sensitive and rebuttable. This is a more conservative conclusion than the Advocate

²⁰ Ibid., points 57 - 59 (as recounted by the CJEU in *Tondela* at para 85).

²¹ *Tondela*, para 53.

²² Ibid., para 89.

General's Opinion, which came closer to suggesting a positive finding of non-application of Article 101(1) TFEU.

Summarising the Referred Questions and the CJEU's Answers

By way of recap, we set out below the three questions referred by the Tribunal da Concorrência, Regulação e Supervisão to the CJEU.

Question 1 (addressed with Question 2): Can the agreement escape Article 101(1)?

Whether the agreement constitutes a "rule of sporting interest" under *Meca-Medina* and, if so, whether it is proportionate and appropriate and therefore compatible with Article 101(1) TFEU in accordance with Article 165 TFEU.²³

CJEU answer (paraphrased):

The *Wouters/Meca-Medina* doctrine is available only as a second step: it comes into play only if the national court first concludes that the agreement does not have an anticompetitive object. If that conclusion is reached and the agreement is found to restrict competition by effect, the prohibition in Article 101(1) TFEU will nonetheless not apply if:

- (i) the agreement pursues a legitimate objective in the public interest; and
- (ii) the measures adopted are appropriate, necessary and proportionate in the strict sense of the term to achieving that objective.

The CJEU confirmed that ensuring the regularity of sporting competitions qualifies as such an objective and is, in principle, capable of justifying the measures at issue. Whether the specific agreement satisfies the requirements of suitability, necessity and proportionality was remitted to the referring court to assess in depth.²⁴

Question 3: Is the agreement a restriction 'by object'?

Whether, on a proper interpretation of Article 101(1) TFEU, the agreement may be classified as a restriction of competition by object, that is, whether it presents a sufficient degree of harm to competition to warrant that characterisation without the need to examine its effects.²⁵

²³ *Ibid.*, para 28(1) and (2).

²⁴ *Ibid.*, paras 91–100.

²⁵ *Ibid.*, para 28(3).

CJEU answer (paraphrased):

The agreement must be categorised as a restriction of competition by object unless a specific examination of its content, its objective aims from a competition standpoint, and its specific economic and legal context makes clear the specific reasons why the competent authority or court considers it should not be so categorised. The CJEU made no definitive finding: the by-object classification is presumed but rebuttable, and the examination was remitted to the referring court.²⁶

Together, these answers confirm that no-poach arrangements in sport are presumptively harmful but that sporting integrity may, in principle, both weigh against a by-object classification and, through the legitimate-objective route, take a proportionate agreement outside Article 101(1) altogether. Even so, only a disciplined, evidence-based examination of the specific facts will determine which side of the line any given agreement falls on.

Concluding Remarks: A blueprint for defence, not replication

The judgment should not be read as a green light for no-poach agreements in sport. If anything, it confirms the opposite: such arrangements remain highly vulnerable under Article 101.

What *Tondela* does provide is a blueprint for how such agreements may be defended in exceptional circumstances:

- the context must be clearly defined and genuinely extraordinary;
- the objective must be legitimate and precisely articulated; and
- the measure must be demonstrably necessary and proportionate.

In that sense, the decision operates less as a relaxation of competition law, and more as a reminder that the concept of ‘by object’ must be applied with discipline.

Whether this leaves a meaningful “corridor” for similar arrangements in the future remains to be seen. Outside crisis settings, the bar will likely be exceptionally high for most sectors, but sport is not simply any other sector. *Tondela*, read alongside *Lehtonen*, confirms that the regularity and integrity of sporting competitions constitute a long-standing, recognised objective capable of justifying restraints that would be unacceptable in other contexts.

²⁶ *Ibid*, para 89.